

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CRAIG H. GONSER,

Defendant-Appellee.

UNPUBLISHED

July 21, 2009

No. 289971

Macomb Circuit Court

LC No. 2008-004833-FH

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

The prosecutor appeals by leave granted the trial court's pretrial ruling regarding the manner in which the court planned to instruct the jury on the elements of gross indecency with a female, MCL 750.338b, and attempted gross indecency with a female, MCL 750.338b and MCL 750.92. The defendant was also charged with indecent exposure, MCL 750.335a. We reverse and remand for further proceedings.

Tina Gonser was the sole witness at defendant's preliminary examination. At that time, defendant was charged with indecent exposure, MCL 750.335a, aggravated indecent exposure, MCL 750.335a(2)(b), and distributing sexually explicit material to a minor, MCL 722.675.

Gonser testified that she met defendant in 1999, married him in June 2006, and was in the process of divorcing him. They had two children during their relationship, a boy and a girl. The incident at issue occurred in March 2004 and concerned their daughter, who was just under two years of age at the time (20 months). Gonser testified that she lived with defendant in the city of Warren in March 2004. Defendant's mother resided in Sterling Heights, but there were also bedrooms in her house for the children and defendant. After getting off early from work, Gonser stopped at the home of defendant's mother, looking for defendant and their daughter. Because the side door was open, Gonser entered the house and went to defendant's bedroom. She saw defendant seated at a computer desk. Gonser also noticed that their daughter was standing next to defendant, holding onto a chair and looking right at him. Gonser observed a picture of a naked woman on the computer screen and saw personal lubrication on the desk. When defendant stood up, Gonser saw his exposed penis. His underwear and pants were down at his ankles. She asked defendant what he was doing, and he told her, "I'm playing with it, do you mind?" Defendant then put his clothes back on.

Defendant was bound over for trial on each of the three initial charges at the conclusion of Gonser's testimony. Subsequently, the trial court granted defendant's motion to dismiss the charges of aggravated indecent exposure and distributing sexually explicit materials. The prosecution then moved to amend the information to add the gross indecency and attempted gross indecency charges pursuant to MCL 750.338b and *People v Bono (On Remand)*, 249 Mich App 115; 641 NW2d 278 (2002). The trial court granted the motion, but questioned whether the prosecution would be required to prove that defendant engaged in the activity in front of the minor in order to enhance his sexual gratification. The parties were advised to research that issue and be prepared to present any proposed special jury instructions.

On the day scheduled for a jury trial, the trial court indicated its intent to utilize a modified jury instruction that would require proof that defendant involved or attempted to involve his daughter in defendant's sexual activity for a sexual purpose. The trial court expressed that some modification of the standard jury instruction was necessary to preclude the potential for criminal liability where a minor enters a bedroom, by accident, during consensual sex between a husband and a wife. The court also determined that there should be no criminal liability if "it just so happened that the minor was present and it had no influence or bearing on his activity." Pursuant to the trial court's order on the matter, CJI2d 20.31, which is the standard jury instruction on gross indecency, would be modified to instruct the jury as follows:

(1) The Defendant is charged with the crime of committing an act of gross indecency. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant engaged in a sexual act that involved the following:

a. masturbation in the presence of a minor, whether in a public place or private place.

b. and that the Defendant involved or attempted to involve the minor in his sexual activity for a sexual purpose.¹

The trial court's order also stayed proceedings pending an appeal by the prosecutor. This Court thereafter granted the prosecutor's interlocutory application for leave to appeal. *People v Gonser*, unpublished order of the Court of Appeals, entered February 27, 2009 (Docket No. 289971).

Issues regarding jury instructions that entail questions of law are reviewed de novo on appeal. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The proper meaning of a criminal statute is also reviewed de novo by an appellate court. *Id.*

¹ This instruction is consistent with CJI2d 20.31, except that the standard instruction does not include the language in (2)b of the court's modified instruction.

We first note that, in general terms, it was not improper for the trial court to question the appropriateness of and to modify CJI2d 20.31, where the standard instructions do not have the official sanction of our Supreme Court and, consequently, courts need not adhere to the language in the standard instructions. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985); *Bono*, *supra* at 123 n 6; *People v Stephan*, 241 Mich App 482, 495; 616 NW2d 188 (2000) (“Where a Criminal Jury Instruction does not accurately state the law, it will be disavowed by the courts.”). “[T]rial judges are encouraged to examine them carefully before using them, in order to ensure their accuracy and appropriateness to the case at hand.” *Petrella*, *supra* at 277.

The gross indecency statute, MCL 750.338b, is part of Chapter XLVIII of the Penal Code, MCL 750.335 *et seq.*, which proscribes a number of indecent and immoral acts. Three provisions address gross indecency. MCL 750.338 applies to “[a]ny male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person. . . .” MCL 750.338a applies to “[a]ny female person who, in public or in private, commits or is a party to the commission of, or any person who procures or attempts to procure the commission by any female person of any act of gross indecency with another female person” Finally, MCL 750.338b, which is the basis for the gross indecency charges brought here, provides:

Any *male person* who, in public or in *private*, commits or is a party to the commission of any act of *gross indecency with a female person* shall be guilty of a felony, punishable as provided in this section. . . . [Emphasis added.]

In *Bono*, *supra* at 121, this Court, citing *People v Warren*, 449 Mich 341, 345; 535 NW2d 173 (1995), observed that, when attempting to determine what constitutes gross indecency under the statutes, it is prudent to decide only the case before the court and not attempt to catalog what is permitted and prohibited. “[T]he circumstances are relevant to a determination whether an act is grossly indecent.” *Bono*, *supra* at 121. As explained in *People v Jones*, 222 Mich App 595, 602; 563 NW2d 719 (1997):

[W]e decline to craft judicially an all-encompassing definition of what is, or what is not, grossly indecent. Until the Legislature gives the courts of this state a workable definition of gross indecency, malleable enough to protect, without unlawfully infringing on, the rights of the public, we must decide case by case, as the Supreme Court did in [*People v Lino*, 447 Mich 567; 527 NW2d 434 (1994)], whether an act is grossly indecent. It is with this in mind that we turn to the case at bar.

In *Lino*, *supra* at 578, our Supreme Court addressed MCL 750.338, and it held, in part, that the defendant's "alleged conduct in orchestrating the conduct of the minors, to facilitate [the codefendant's] sexual arousal and masturbation in the presence of the minors would constitute the offense of procuring, or attempting to procure, an act of gross indecency even though it was not committed in a public place." The Court then stated that "[p]rocurring or attempting to procure an act of gross indecency with a person under the age of consent can support a conviction under MCL 750.338[.]" *Id.*

On the basis of *Lino*, we can confidently conclude that, in the context of the situation in the case at bar, the crime of gross indecency was committed if it was proven that defendant

masturbated in the presence of his daughter *and* if defendant orchestrated her involvement in the episode, even if it was just making sure that she was present, in order to facilitate his sexual arousal and his act of masturbation. This would be consistent with the trial court's modified jury instruction. The question is, however, whether the crime of gross indecency is committed under somewhat less egregious circumstances.

Lino involved, in one of the consolidated cases, teenage minors who actively engaged in physically and verbally abusing an adult, but not sexually, while the adult masturbated, which abuse facilitated the adult's sexual arousal and act of masturbation. Here, we also have a minor; however, she was only about two years old at the time and clearly not capable of willingly facilitating defendant's sexual act, nor capable of understanding what was transpiring and why it was taking place. Yet, she was of sufficient age to observe and recognize that, if the allegations are true, her father was using his hands to touch himself between his legs and in a certain manner, with his pants being around his ankles; a two-year-old child has some familiarity with the human body. The case law cited above demands that we consider the totality of the circumstances in each particular case when determining whether an act of gross indecency has been committed. In doing so, and in contemplating a proper jury instruction to accompany our conclusion, we hold that if the prosecution proves beyond a reasonable doubt that an adult man masturbated or continued to masturbate in the presence of a two-year-old female child, or a female child of approximately that age, such as defendant's daughter, *knowing that the child was present and knowing that she could observe the act of masturbation*, he has committed an act of gross indecency with a female in violation of MCL 750.338b.² Under these circumstances, there is no need for the prosecutor to additionally prove that a defendant involved the child for the purpose of facilitating sexual arousal, as may occur with a pedophile. Simply stated, it is grossly indecent for a grown man to knowingly masturbate in front of a two-year-old girl, whether she is his child or another person's child, regardless of whether the child's presence was used to facilitate sexual arousal. Our instruction goes beyond CJI2d 20.31, adding a "knowledge" element under the charges brought in this case and given the circumstances. See *People v Abramski*, 257 Mich App 71, 73; 665 NW2d 501 (2003) (a knowledge element of an offense may be necessary simply to prevent innocent acts from constituting crimes). The trial court is to instruct the jury in accordance with this ruling.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood

² We emphasize that our ruling is case specific. If a two-day-old female child were involved, we very well may not have concluded that a statutory violation would occur based simply on the adult male being knowledgeable of the child's presence and opportunity to view the act of masturbation. If, however, under such a scenario, there was additional proof that the act was committed in order to facilitate sexual arousal, a statutory violation may well have occurred.